No. 89-1279

In the Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY, PETITIONER

v.

CLEOPATRA HASLIP, ET AL., RESPONDENTS

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF ARTHUR ANDERSEN & CO., COOPERS & LYBRAND, DELOITTE & TOUCHE, ERNST & YOUNG, KPMG PEAT MARWICK, AND PRICE WATERHOUSE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici will address the following questions, the first of which corresponds to Question 2, and the second to Questions 1 and 3, in the petition for a writ of certiorari:

1. Whether the Due Process Clause forbids the imposition of punitive damages under a respondeat superior theory on an entity that has not engaged in any culpable conduct.

2. Whether allowing juries to rely on the ratio of punitive to compensatory damages and the size of the defendant provides the kind of standards necessary to prevent unconstitutionally arbitrary and excessive awards of punitive damages.

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INTEREST OF THE AMICI CURIAE

With the consent of the parties pursuant to Rule 37 of the Rules of this Court, the amici curiae submit this brief in support of petitioner.

The amici curiae are firms engaged in the practice of the profession of accounting and auditing. They believe they are the six largest firms practicing this profession in the United States, reporting, collectively, on the financial statements of more than 90 percent of those companies whose securities are publicly traded in the United States. The amici, which are organized as partnerships, are collectively composed of nearly 9000 partners and more than 78,000 other professional employees, and practice in some 600 offices throughout the United States.

Congress long ago concluded that independent public accountants perform an important public service. Under the Securities Act of 1933 and the Securities Exchange

Act of 1934, all public companies whose securities are registered with the Securities and Exchange Commission must have their financial statements examined by public accountants. See 15 U.S.C. § 77aa (Schedule A) (25)-(27); *id.* § 78*l*(b)(1)(J)-(K).

Amici have in recent years become chronically targeted by plaintiffs as a "deep pocket" in various types of commercial tort litigation. Specifically, amici have witnessed a dramatic increase in the number of state and federal law claims filed against them, ostensibly based on their rendition of professional services. Four times as many such claims were filed against amici in 1989 as were filed in 1981. Amici are concerned that this increase in exposure to the risks of litigation may cause them difficulty in attracting and retaining the most qualified of professional personnel. See Note, *Detecting and Preventing Financial Statement Fraud: The Roles of the Reporting Company and the Independent Auditor*, 5 Yale L. & Pol'y Rev. 514, 526 (1987) (accounting profession is "finding it increasingly difficult to attract quality personnel").

The lawsuits filed against amici often contain a request for punitive damages. Even when the claim is meritless, the punitive damage claim can skew litigation strategies: it is a classic instance of a plaintiff's *in terrorem* litigation tactic, by which a lawsuit may be endowed with "a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975).

Because of the substantial impact of even the threat of punitive damages on a profession whose activities Congress has found to be in the public interest, amici believe that their views on the question of constitutional limits on the vicarious imposition of punitive damages may be of assistance to the Court's consideration of this case.

STATEMENT

The facts of this case will be stated in the parties' briefs and need not be repeated here. Amici, like petitioner Pacific Mutual Life Insurance Company, face the threat of being "punished" by punitive damages awarded under the doctrine of respondeat superior for conduct undertaken by individuals, without any showing of fault by the firm. The root constitutional problem with such vicarious punitive liability is precisely the same for corporations like petitioner and professional partnerships like amici: punishment without culpability violates elementary principles of due process. At the same time, however, amici differ from corporate defendants both in their organizational form and in the nature of their work.

The imposition of vicarious punitive liability on amici for the torts of individual auditors is an especially pernicious form of punishment-without-fault because financial statement auditing is widely misperceived as an exact science that can provide absolute insurance against accounting missteps by corporate management. In fact, the process is one requiring the exercise of judgment at every stage, and a properly performed audit can provide only *reasonable* assurance that management has not materially misstated the company's financial position. When a jury mistakes an auditor's innocent error for intentional misconduct and imposes vicarious liability without fault, it is hard to see any justification for spreading the "punishment" from him to his hundreds of partners who had nothing to do with the error. Thus, amici have a unique need for protection from unjustified and unconstitutional vicarious punishment.

In general, the rules in the various States governing the circumstances in which a jury may hold an actor liable for punitive damages based on his *own* conduct are confused, if not altogether incoherent. See Note, *The Publicly Held Corporation and the Insurability of Punitive Damages*, 53 Fordham L. Rev. 1383, 1397 (1985)

("Each jurisdiction, and sometimes it seems each judge, determines the type of behavior warranting [a punitive] award."); Comment, *Punitive Damages Insurance: Why Some Courts Take the Smart Out of "Smart Money"*, 40 U. Miami L. Rev. 979, 989 (1986) (minimum standard of culpable conduct for punitive award "has been anything but standard"). There is even more confusion and incoherence about the rules by which one may be held vicariously liable for punitive damages based on the conduct of another. Indeed, commentators are unable to agree on what vicarious punitive liability rules the States actually employ. Compare J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* § 24.01, at 2 (1985), with W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on Torts* § 2, at 13 (5th ed. 1984) (each pronouncing opposite "majority" rules for vicarious punitive liability); see also Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 63 n.266 (1982) (criticizing "Prosser's misleading statement"). But ironically, there is one statement that can be made with certainty: those rules render it far easier to impose vicarious liability for punitive damages on a firm for the torts of its personnel than to impose punitive damages on a primary tortfeasor himself.

Roughly speaking (and bearing in mind the impossibility of neat formulations), punitive liability may not be imposed directly on an individual without the intentional or reckless commission of a civil wrong. See *Smith* v. *Wade*, 461 U.S. 30, 46-48 (1983); Restatement (Second) of Torts § 908; *Prosser & Keeton on Torts* § 2, at 9-10; K. Redden, *Punitive Damages* §§ 2.1, 3.1(A) (1980).[1]

In contrast, juries in many jurisdictions may impose punitive damages on a firm simply for the tort of a person in a managerial position acting within the scope of

[1] A few jurisdictions hold that gross negligence may suffice for the imposition of direct punitive liability. See, *e.g.*, *Wooderson* v. *Ortho Pharmaceutical Corp.*, 681 P.2d 1038, 1061 (Kan.), cert. denied, 469 U.S. 965 (1984); *Mullins* v. *Ward*, 712 P.2d 55, 63 n.22 (Okla. 1985).

his duties, even if the firm was altogether prudent in its hiring and supervision of that person. See, *e.g.*, *Hatrock* v. *Edward D. Jones & Co.*, 750 F.2d 767, 771-772, 773 n.3 (9th Cir. 1984) (Idaho law); *Purvis* v. *Prattco, Inc.*, 595 S.W.2d 103 (Tex. 1980); Restatement (Second) of Torts § 909(c). Other jurisdictions employ a still more expansive test by allowing vicarious punitive liability for the tort of any individual associated with a firm, whether or not in a "managerial" capacity. See, *e.g.*, *Dean Witter Reynolds, Inc.* v. *Genteel*, 346 Pa. Super. 336, 499 A.2d 637, 643 (1985), allocatur denied, 514 Pa. 639, 523 A.2d 346 (1987); *Embrey* v. *Holly*, 293 Md. 128, 442 A.2d 966, 969-971 & n.6 (1982); *Stroud* v. *Denny's Restaurant, Inc.*, 532 P.2d 790 (Or. 1975). The upshot is that in most jurisdictions a firm may be subjected to vicarious punitive damage liability despite the total absence of tortious conduct on the part of the firm itself and despite the firm's inability, as a practical matter, to prevent the commission of the underlying tort.

Not surprisingly, such harsh yet porous rules offer virtually no protection against the unfettered imposition of vicarious punitive liability. In our view, a vicarious punitive award against a firm under the state law standards outlined above is a violation of due process if the firm did not itself engage in culpable conduct. In the absence of such conduct, a jury awarding punitive damages against a firm that is only vicariously liable will be meting out punishment that neither stems from nor deters culpable behavior but merely punishes an entity for employing the wrongdoer, who will rarely be acting in his employer's interest when he does the wrong. The award thus becomes a wholly gratuitous punishment of innocent persons—a violation of basic rules of due process.

SUMMARY OF ARGUMENT

I. The version of respondeat superior applied below permits the imposition of punitive damages on an entity for the act of its employee without any fault on the part of the entity. This Court long ago condemned punishment of the innocent through vicarious imposition of

punitive damages. *Lake Shore & M.S. Ry.* v. *Prentice*, 147 U.S. 101 (1893). The question now before the Court is whether the feature of such vicarious liability that makes it objectionable—the imposition of punishment without culpability—is of constitutional dimension.

The principle that there cannot be punishment without culpability is firmly grounded in this Court's due process cases. From *Felton* v. *United States*, 96 U.S. 699 (1877), through *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960), through *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the Court has reaffirmed that basic principle of due process. Although the Due Process Clause allows the States to demand *compensation* without culpability, it has never permitted *punishment* without any culpability on the part of the person or entity punished.

Punitive damages are indeed punishment. Their justifications are retribution and deterrence. But it makes no sense to exact retribution from those who have done no wrong, and one cannot deter by punishing someone who did not engage in the misconduct and could not have prevented it.

That kind of unconstitutional punishment-without-fault is what occurred in this case. Lemmie Ruffin, not Pacific Mutual, engaged in gross misconduct, and the courts below did not even ask whether anyone other than Ruffin committed misdeeds that could be blamed on Pacific Mutual as an entity.

Amici's auditing activities exemplify the gross unfairness of the system in which one person's acts lead to punishment of others. Amici are organized as large, decentralized entities precisely to enable them to provide proper service to their clients. On extremely rare occasions, individual professionals may engage in flagrant misdeeds, and more commonly they may make debatable judgments or innocent mistakes, but it is completely senseless to punish the thousands of partners in a firm who may not even be aware that a particular audit is taking place, let alone that it is being mishandled.

In the case of amici, punitive damages are an especially inappropriate way to foster the deterrence of undesirable conduct. Amici's professional reputations, and exacting requirements imposed by professional organizations, already induce amici to spend hundreds of millions of dollars on preventive quality control measures. There is no need for any additional incentives that might be provided by allowing the States to punish amici for misdeeds committed without their complicity.

II. The *amount* of a punitive damage award against a firm or an individual must also satisfy the purposes behind the imposition of punitive damages to avoid running afoul of Fourteenth Amendment limitations. Although a variety of factors may be constitutionally appropriate to consider in determining the size of a punitive award, neither a simple multiplication of the compensatory damage award nor a simple reference to the size of the defendant should suffice, standing alone, to justify the amount of a punitive award. Multiplication of compensatory damages leads to excessive results when, as with amici, potentially very large compensatory awards—themselves wholly disproportionate to the relatively small gains realized by the wrongdoing—already provide substantial punishment and deterrence. Mere reference to the size of the firm is even less appropriate because it sets the amount of the punitive award by reference to the wrongdoer rather than the wrong. A focus on the actual or expected gain from the wrong would be a more appropriate constitutional benchmark for petitioner, amici, and other organizations that are charged with economic torts.

ARGUMENT

I. DUE PROCESS FORBIDS THE IMPOSITION OF PUNITIVE DAMAGES BASED ON A VICARIOUS LIABILITY THEORY AGAINST AN ENTITY THAT IS NOT ITSELF CULPABLE

Notwithstanding the number of courts that have permitted the imposition of punitive damages on the basis of respondeat superior, the practice violates elementary

principles of due process. This Court's cases have long established that the imposition of punishment without culpability is unconstitutional. And the vicarious imposition of punitive damages—without any determination that the principal even violated a duty of care in selecting the wayward agent, let alone engaged in misconduct of its own—constitutes just such punishment without culpability.

A. The Due Process Clause Forbids The Imposition Of Punishment Without Culpability

Respondeat superior or vicarious liability, of course, is by definition the imposition of liability on the principal for the act of the agent, completely without regard to the role of the principal. Wrongdoing by the principal is altogether unnecessary. The argument against the vicarious imposition of punitive damages, therefore, is the simple point that one who has done no wrong should not be punished.

In forbidding vicarious punitive damages against a corporation under federal common law, this Court stated simply: "'No man should be punished for that of which he is not guilty.'" *Lake Shore & M.S. Ry.* v. *Prentice*, 147 U.S. 101, 115 (1893) (quoting *Hagan* v. *Providence & Worcester Railroad*, 3 R.I. 88, 91 (1854)). Commentators have long accepted this fundamental proposition. "If there is no proof to show the master's wrong, there is no basis for measured severity of admonition, and so no place for the doctrine of punitive damages." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1205 (1931). "Ethical considerations suggest that shareholders whose fault cannot be established should not be held liable for punitive damages * * *." Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 Yale L.J. 1296, 1306-1307 (1961). "[P]roponents of vicarious punitive damage liability have difficulty arguing that employers deserve to be punished for the wrongful acts of their employees. Rarely does one see a positive assertion

to that effect." Ellis, *supra*, 56 S. Cal. L. Rev. at 66-67 (footnote omitted).

The question before this Court is whether the principle underlying opposition to the vicarious imposition of punitive damages—that punishment should not be imposed without fault—is of constitutional dimension. It plainly is.

More than a century ago, this Court wrote in *Felton* v. *United States*, 96 U.S. 699, 703 (1877), that "the law * * * is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions, and the usual means to comply with them are adopted. All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one." Such an injustice is exactly what the Due Process Clauses of the Fifth and Fourteenth Amendments forbid.

Substantive due process, "in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935). Furthermore, "[t]he touchstone of due process is protection of the individual against arbitrary action of government,"[2] and punishment for blameless conduct is surely an example of arbitrary governmental action. Thus, the principle that there can be no punishment without guilt has come to be recognized as one grounded in the Due Process Clauses.

For example, in *Lambert* v. *California*, 355 U.S. 225 (1957), in overturning a conviction as a matter of substantive due process, the Court quoted Justice Holmes' statement that "'[a] law which punished conduct which

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[2] *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986); *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (Brennan, J., concurring).

would not be blameworthy in the average member of the community would be too severe for that community to bear,'" and added that "[i]ts severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it." *Id.* at 229 (quoting O. Holmes, *The Common Law* 50 (1881)). Thus, although a State certainly is free in general to determine what is blameworthy conduct, it does not under the Due Process Clause have the same freedom to punish someone who has done nothing blameworthy.[3]

In a variety of different contexts, this Court has reiterated the fundamental theme that punishment is permissible only on a showing of culpability. In *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960), dealing with the constitutional minimum predicate for the imposition of criminal punishment, the Court held that it is the Due Process Clause, not just state law, that requires some showing of "guilt" before a person can be punished. See also *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 405 (1966) (Stewart, J., concurring) ("In the present case it is enough for me that Pennsylvania allows a jury to punish a defendant after finding him not guilty. That, I think, violates the most rudimentary concept of due process of law."). In *Ingraham* v. *Wright*, 430 U.S. 651, 671-672 n.40 (1977), dealing with corporal punishment of schoolchildren, the Court stated that the Due Process Clause applies "[w]hen the State seeks to impose punishment without * * * an adjudication [of guilt]." Although that principle was stated in a case principally addressing the

[3] For this reason, our position does not call into question the ability of a State to define strict liability criminal offenses without a mens rea requirement. Our position is not that the State is constitutionally compelled to refrain from punishing everyone who lacks evil intent, but that the State is constitutionally compelled to make *some* inquiry into the culpability—however that may be defined—of the precise person or entity being punished. Here, no such inquiry was undertaken. It was enough for the court below that Ruffin was acting within the scope of his employment, and no inquiry into *Pacific Mutual's* culpability was made under any standard.

procedural safeguards that must accompany a particular kind of punishment, the Court has made clear that *substantive* due process imposes the requirement that punishment follow only from guilt. In *Bell* v. *Wolfish*, 441 U.S. 520, 535 n.16 (1979), dealing with the conditions of confinement of pretrial detainees, the Court cited *Ingraham*'s footnote 40 and stated flatly that "[d]ue process requires that a pretrial detainee," not yet having been determined to be guilty of anything, "not be punished." The Court added: "Retribution and deterrence are not legitimate nonpunitive governmental objectives." *Id.* at 539 n.20. See also *United States* v. *Halper*, 109 S. Ct. 1892, 1902 (1989); *United States* v. *Salerno*, 481 U.S. 739, 746 (1987); *Schall* v. *Martin*, 467 U.S. 253, 264, 269 (1984).

There is, of course, no principle forbidding any and all imposition of liability without a showing of culpability. Tort liability for compensatory damages does not involve punishment and thus generally does not raise due process problems. See note 6, *infra*. Furthermore, even criminal liability can be imposed without a showing of any particular *level* of culpability; it is enough that the defendant had "power * * * to prevent or correct the prohibited condition." *United States* v. *Park*, 421 U.S. 658, 673 (1975). But this Court has never departed from the principle that due process requires *some* level of culpability before *punishment* can be imposed.[4] And the

[4] *Louis Pizitz Dry Goods Co.* v. *Yeldell*, 274 U.S. 112 (1927), is not an exception to that principle. The statute involved in that case had been construed to be "'remedial, and not penal,'" and the Court addressed the case "on the assumption that its scope was thus limited." 274 U.S. at 114, 115 (quoting *Southern Ry.* v. *Bush*, 122 Ala. 470, 489, 26 So. 168, 174 (1899)). The Court said by way of dicta that "the imposition of liability"—meaning *compensatory* damages—in those circumstances is not repugnant to due process, and the Court commented without necessarily approving that "some jurisdictions" extend such liability to punitive damages. The Court did *not* say, even by way of dicta, that "the imposition of punitive damages 'without personal fault, having its foundation in a recognized public policy, is not repugnant to accepted notions of due process of law.'" Br. in Opp. 22 (quoting 274 U.S. at 115).

culpability, of course, must be that of the person or entity punished, not that of some related person. Due process would not allow the imprisonment of, or punitive monetary sanctions against, the next-door neighbor or the brother of a person shown to be culpable. Cf. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) ("the basic concept of our system [is] that legal burdens should bear some relationship to individual responsibility or wrongdoing").

B. The Vicarious Imposition Of Punitive Damages Constitutes Punishment Without Culpability

Under the constitutional principles discussed above, States are not free to punish blameless conduct. That is just what the vicarious imposition of punitive damages does. Furthermore, the vicarious imposition of punitive damages on firms such as amici is both especially burdensome and wholly unnecessary.

1. *Punitive Damages Constitute Punishment*

It requires no elaborate analysis to see that punitive damages are indeed what they purport to be—punishment. This Court so stated unequivocally just last Term in *United States* v. *Halper*: "As the name indicates, punitive damages, available in civil cases, serve punitive goals." 109 S. Ct. at 1901 n.8. That they are not *criminal* punishment is quite immaterial for purposes of applying the due process guarantees discussed above. "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law * * *." *Id.* at 1901.[5] Although *Halper* itself concerned the Double Jeopardy Clause, this Court drew on the very due process cases discussed above in concluding that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 1902 (citing *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 169 (1963), and *Bell* v. *Wolfish*, *supra*).

Earlier cases mandate the same conclusion. The only purposes of punitive damages are retribution and deterrence. As this Court has explained, punitive damages "*by definition* are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981) (emphasis added). See also *Smith* v. *Wade*, 461 U.S. at 49; *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

Although *City of Newport* and the other cited cases were not decided under the Due Process Clause, they supply the predicate—that punitive damages are based on "[r]etribution and deterrence," which "are not legitimate nonpunitive governmental objectives" (*Bell* v. *Wolfish*, 441 U.S. at 539 n.20)—necessary to see that due process forbids their imposition on those whose guilt has not been shown. One cannot properly "punish" by visiting punitive damages on "blameless or unknowing" persons who "took no part in the commission of the tort." *City of Newport*, 453 U.S. at 267. Similarly, one does not "deter" by fixing punitive liability on a person who is incapable of altering his conduct to prevent "similar

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[5] See also *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (protections of Due Process Clause extend to "civil * * * defendants"); *Giaccio* v. *Pennsylvania*, 382 U.S. at 402 ("[b]oth liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label [of civil or criminal] a State chooses to fasten upon its conduct or its statute"); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 463 (1927) ("[t]he principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation").

extreme conduct." See *id.* at 267, 268-270.[6] "Punitive damages are imposed to punish the wrongdoer and deter others from engaging in similar conduct in the future. These objectives are not achieved when courts drop the punitive damage hammer on the principal for the wrongful acts of the simple agent or lower echelon employee. As McCormick states: 'There would seem to be little justification for punishing the master for willfulness or wantonness of which the agent is alone guilty.'" *In re P & E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989) (citation omitted) (quoting C.T. McCormick, *Handbook on the Law of Damages* § 80, at 282 (1935)).

In light of these principles, we submit that a punitive damage award against a large professional firm based on nothing more than vicarious liability for tortious conduct by the individuals involved in a particular engagement conflicts with the underlying rationale for punitive damages and would, "by definition," constitute punishment-without-fault that is impermissible under the Due Process Clause.

2. *Respondeat Superior Liability Is Imposed Without Culpability*

As a matter of general common law, this Court condemned the vicarious imposition of punitive damages a century ago in *Lake Shore & M.S. Ry.* v. *Prentice.* Although not stated in a constitutional context, the principles that the Court applied are the same ones that the

[6] As is obvious from this Court's discussion in *City of Newport*, nothing in our analysis impugns the general rule of respondeat superior for *compensatory* tort liability. "[W]hereas the purpose of compensatory damages—compensation of the victim—is accomplished whether payment comes from the master or his misbehaving servant, that of punitive damages—to punish the wrongdoer and deter him and others from duplicating his misconduct—is not. Unless the employer is himself guilty of some tortious act (or omission) because his employee has misbehaved, an award punishing the employer and deterring him and others situated to act likewise (*i.e.*, other employers) makes no sense at all." *Williams* v. *City of New York*, 508 F.2d 356, 360 (2d Cir. 1974).

Due Process Clause, as discussed above, mandates. Thus, the Court wrote:

> Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent. * * *
>
> * * * *
>
> '[An award of punitive damages] is only justified in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent.' * * *
>
> This rule has the same application to corporations as to individuals.

147 U.S. at 107-109 (quoting *Keene* v. *Lizardi*, 8 La. 26, 33 (1835)).[7]

[7] In *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982), Members of this Court debated in footnotes whether *Lake Shore* was consistent with the decisions of state courts in the late 19th century. Compare 456 U.S. at 575 n.14 (majority) with *id.* at 589 n.15 (Powell, J., dissenting). The Court did not purport to resolve the question, however, and the question was not in fact presented by the case, which involved *statutory* treble damages and not punitive damages awarded by a jury. See *Thyssen, Inc.* v. *S.S. Fortune Star*, 777 F.2d 57, 67 n.10 (2d Cir. 1985) (Friendly, J.) ("The [*Hydrolevel*] footnote seems to have been quite unnecessary since the issue was not corporate liability for punitive damages but for the treble damages provided for private antitrust suits * * *, and, as the Court itself noted, rules limiting a principal's liability for punitive damages do not apply to specific statutes giving treble damages.") (citation omitted). Thus, *Hydrolevel*'s dictum about state decisions of the late 19th century is of no relevance here.

What the Court recognized in *Lake Shore*, and what is undeniable, is that the *vicarious* imposition of punitive damages is the imposition of punishment on the principal completely without regard to its level of culpability, be it high, low, or nonexistent. See generally Note, *supra*, 70 Yale L.J. at 1304-1309. In this case, for example, the Supreme Court of Alabama found it significant only that "Ruffin was [not] acting outside the scope of his agency [and] that his acts were [therefore] * * * imputable to Pacific Mutual." Pet. App. B9-B10. There was neither a jury instruction nor a determination by the state courts that Pacific Mutual *itself* had *any* culpability whatever.[8]

Indeed, the proponents of allowing punitive damage awards on the basis of respondeat superior do not attempt to support it by any reference to the fault of the

[8] Respondents have endeavored to supply the missing factual determination (Br. in Opp. 5-6, 22), but a mere recitation of the evidence presented at trial cannot take the place of determinations made by a properly instructed jury or a state court applying its own law. In particular, once this Court establishes that it was constitutionally improper to award punitive damages against Pacific Mutual based solely on the fact that Ruffin was acting within the scope of his employment, it will be up to the state courts in the first instance to decide whether the alleged negligence of another Pacific Mutual agent (Lupia) in not remedying the fraud was enough to justify a punitive damages award against Pacific Mutual. That issue presents at least two difficult questions that may themselves implicate the Due Process Clause: (1) whether it is permissible to impute Lupia's conduct to Pacific Mutual (see generally Restatement (Second) of Torts § 909(c)); and (2) whether, contrary to the usual principles governing punitive damages (see p. 4 & note 1, *supra*), mere negligence (which is the most that Lupia's conduct could fairly be called), as opposed to willful misconduct, can give rise to punitive damages. Whatever the proper resolution of those questions, they have not yet been addressed by the state courts, because those courts held that the imposition of punitive damages was permissible on the basis of respondeat superior alone. It is that holding that is before the Court, and it is that ruling that the Court should reverse under settled principles of due process.

principal punished for his agent's tort.[9] Often, they make no attempt to justify the rule at all, instead simply proceeding by the false syllogism that a principal is liable for the acts of his agent in the course of his agency, that the torts were committed in the course of the agency, and that therefore the principal is liable for punitive damages whenever the agent would be. See, *e.g.*, Pet. App. B7-B10. Such reasoning completely ignores the vast distinction between compensation and punishment, yet the Due Process Clause has never permitted that distinction to be cast aside.

Those who *do* supply a theory for the vicarious imposition of punitive damages generally say that "the policy behind the doctrine of respondeat superior, that of encouraging employers and other principals to select their employees and other agents carefully, is fully engaged by" awarding punitive damages against the principal. *Tippecanoe Beverages, Inc.* v. *S.A. el Aguila Brewing Co.*, 833 F.2d 633, 638 (7th Cir. 1987). But that is a startling proposition when advanced to justify the imposition of punishment on one whose culpability has *not* been placed in issue and who is already liable for compensatory damages. It is one thing to say that a principal's selection of an unsuitable agent *can*—on appropriate proof—be an act so lacking in care as to constitute culpable action on which punitive damages might be based. It is quite a different thing to say that in every case the principal can be punished for selecting an agent who eventually commits a tort, even if the principal could not have foreseen the agent's misconduct and did not ratify it. Yet it is the latter formulation that must underlie the position that punitive damages can be imposed without individualized guilt. Thus, to sanction the respondeat superior rule on this basis would be "[t]o punish a person because he has done what the law plainly

[9] "[V]icarious punitive damage liability cannot be justified as deserved punishment. Indeed, it is usually conceded to be unfair. Deterrence alone is thus relied upon to justify it." Ellis, *supra*, 56 S. Cal. L. Rev. at 71.

allows him to do"—selected an agent whose misdeeds could not be foreseen—"a due process violation of the most basic sort." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978).[10]

To be sure, artificial entities such as corporations and partnerships can act only through human beings, and the concept of organizational "fault" necessarily presupposes that *some* individuals' acts will be deemed those of the artificial entity so as to subject it to punitive damages. But at the same time, "[a]lthough vicarious defendants are often artificial persons such as municipalities or business corporations, that serves only to disguise the fact that the punishment ultimately falls upon natural persons who have not committed wrongful or harmful acts." Ellis, *supra*, 56 S. Cal. L. Rev. at 66. Those innocent persons—shareholders or partners—entrust specific persons (corporate directors and management, or the partnership as a whole or a management committee) to act in the name of the entity, and they must accept the consequence that, if those persons in the name of the entity commit culpable misdeeds, punitive damages may follow. In addition, every corporate shareholder or member of a partnership knows that he must bear the cost of compensating anyone who is injured by

[10] Equally unconvincing is the argument that "punitive damages [should] be awarded against an employer for an employee's wrongdoing *without proof of fault on the employer's part*" because, "[u]nless a corporation that profits from the wrongdoing of its agents is made to bear the cost of that wrongdoing, the corporation will have an incentive to conduct its affairs through judgment-proof employees, and will escape punishment for wrongdoing that it condones and profits from." *Douglass* v. *Hustler Magazine, Inc.*, 769 F.2d 1128, 1145 (7th Cir. 1985) (emphasis added), cert. denied, 475 U.S. 1094 (1986). No incentive to engage in misconduct and to "condone[]" wrongdoing exists under a system that *does* require proof of fault, because those activities plainly constitute fault. Moreover, the corporation *is* "made to bear the cost of that wrongdoing" through compensatory damages awarded under respondeat superior, whatever the rule concerning punitive damages. Thus, the unwanted incentives that the rule allowing no-fault punitive damages are supposed to remove do not exist in the first place.

the activities of the firm, including the activities of its low-level agents and employees. But no just principle requires that, by purchasing shares in a corporation or entering into a partnership, individuals subject themselves to *punishment* for the misdeeds of anyone and everyone who carries out any of the activities of the firm. The Due Process Clause forbids visiting such punishment on the heads of the innocent.

This Court recognized in *City of Newport* that "[n]either reason nor justice" supports the imposition of punitive damages beyond those imposed on the individual wrongdoer. 453 U.S. at 267. Not only did the Court recognize that it is "not sensibl[e]" to make an employing municipality liable for punishment for the subordinate's malice (*ibid.*), but also the Court explained why the deterrence objective of punitive damages is actually undermined by imposing liability on a collective entity rather than the individual tortfeasor: "[A]llowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, * * * directly advances the public's interest in preventing repeated" torts, and "a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer." 453 U.S. at 269, 270. Those statements referred specifically only to governmental liability, but their logic applies equally to the vicarious liability of any collective entity: a corporation or partnership, no less than a municipality, must reach into the pockets of innocent persons in order to pay punitive damages judgments occasioned by a single individual's behavior, and diffusing the judgment undermines its deterrent effect in either situation. In private cases, as in governmental cases, it simply makes no sense to visit punishment on persons who have done no wrong.

3. *The Organization And Activities Of Large Accounting Firms Graphically Illustrate The Danger Of Punitive Damages Imposed On The Basis Of Vicarious Liability*

Clients and the public rely on independent auditors for the exercise of disinterested professional judgment in the examination of client financial statements. To fulfill that expectation, amici have become the very large and complex professional organizations already described; large corporations require large accounting firms to undertake the massive task of auditing their financial statements. Importantly, however, the size of firms such as amici permits them to maintain a highly diversified client base that serves to enhance audit quality and the maintenance of professional independence from even the largest of their clients. See Fischel, *The Regulation of Accounting: Some Economic Issues*, 52 Brooklyn L. Rev. 1051, 1052-1053 (1987); Ricardo-Campbell, *Comments on the Structure of Ownership and the Theory of the Firm*, 26 J.L. Econ. 391, 392 (1983).

In addition, public accounting, like law, is a profession in which the needs of clients are met through the judgment and personal services of a team of professionals. Contrary to the common belief of the public—and of juries—the work of an accountant is not at all mechanical. "Instead, modern audits of complex enterprises require accountants to make numerous judgments about the proper characterizations of the data and the reliability of the client's accounting systems." Siliciano, *Negligent Accounting and the Limits of Instrumental Tort Reform*, 86 Mich. L. Rev. 1929, 1962 n.158 (1988). Familiarity with the details of the client's business and transactions is integral to these daily judgments, which therefore must generally be made on a decentralized basis by the accounting professionals involved in the engagement who have gained that familiarity (see Fama & Jensen, *Agency Problems and Residual Claims*, 26 J.L. Econ. 327, 334 (1983))—often unavoidably "by rela-

tively junior members of the accountant's staff." Siliciano, *supra*, 86 Mich. L. Rev. at 1962 n.158.

Thus, the size of the organizations necessary for amici to satisfy clients and the public, combined with the unavoidable necessity for discretionary decisions by thousands of professionals practicing throughout the country, makes the threat of unwarranted vicarious punitive liability against large public accounting firms especially acute. That threat may become reality in two kinds of situations. First, there is the extremely rare but nonetheless grave occurrence of altogether wayward conduct by an accounting professional based on venal personal motives. A notorious example of this type of problem is the exchange of falsifications and bribes between a partner of the accounting firm of Alexander Grant & Co. and E.S.M. Group.[11] In general, there is little that accounting firms can do to prevent that sort of aberrational conduct, and punitive damages assessed against a firm in such circumstances obviously do not further the purposes of punishment and deterrence. Instead, the appropriate response is the invocation of the criminal process in appropriate cases.[12]

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[11] See Petition for Writ of Certiorari at 25a-26a in *Peat Marwick Main & Co.* v. *Tew*, No. 87-1727, cert. denied, 486 U.S. 1055 (1988). The Alexander Grant partner pleaded guilty to criminal charges of larceny and grand theft brought against him by the State of Ohio for his role in the E.S.M. fraud.

[12] There have been instances in which individual members of amici's firms have been subjected to indictment and trial on criminal charges. See *United States* v. *Simon*, 425 F.2d 796 (2d Cir. 1969) (two partners and a senior manager were convicted (but later pardoned) of conspiracy to commit mail fraud and to certify a false and misleading financial statement for Continental Vending Corporation), cert. denied, 397 U.S. 1006 (1970); *United States* v. *Clark*, 360 F. Supp. 936 (S.D.N.Y.) (preliminary ruling on criminal actions against three accountants alleging securities law violations in connection with financial statements of Four Seasons Nursing Home Centers; two of the accountants were acquitted and charges against the third were dropped following a hung jury),

A second problem facing firms such as amici, which is much more frequent if less dramatic than the first, arises from the fact that juries often tend to assume that a diligent, careful accountant should never make a mistake in his work. Cf. R. Gormley, *The Law of Accountants and Auditors* ¶¶ 1.06, 1.07 (1981) (noting common misperceptions among the general public concerning the role of the independent auditor). Indeed, juries sometimes view the routine mistakes of accountants as reckless or even intentional acts. See generally *In re Paris Air Crash*, 662 F.2d 1315, 1323 (9th Cir.) (Kennedy, J.) (noting "the temptation for a jury to award punitive damages even when concrete elements of fraudulent or intentional wrongdoing are absent"), cert. denied, 449 U.S. 976 (1980).

For example, a Florida jury in 1984 awarded more than $2 million in punitive damages to E.S.M. Group—before the revelation that E.S.M. was permeated by fraud—against Peat Marwick Mitchell & Co. (predecessor to amicus KPMG Peat Marwick) for "gross negligence amounting to fraud," based on the professional decision of two partners in one of Peat Marwick's Florida offices as to the form of a report to be rendered on the client's financial statements. Similarly, a Mississippi jury awarded $500,000 in punitive damages against Touche Ross & Company (predecessor to amicus Deloitte & Touche) based on the jury's conclusion that personnel in the firm's Jackson office had been grossly negligent in their audit of a client's financial statements, even though the alleged negligence amounted to no more than a disagreement over the requirements of generally accepted accounting principles (GAAP) and generally accepted auditing standards (GAAS).[13] In each of those cases, the local partners were engaging in the kind of discretionary decisionmaking that accountants must make constantly, and in which misjudgments—or what someone perceives to be misjudgments—unavoidably will occur.

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mandamus denied, 481 F.2d 276 (2d Cir. 1973); *United States* v. *Natelli*, 527 F.2d 311 (2d Cir. 1975) (a partner was convicted (but later pardoned) of making false statements in the 1969 National Student Marketing proxy statement), cert. denied, 425 U.S. 934 (1976).

It was plainly senseless—and a violation of due process—to visit "punishment" and "deterrence" upon the thousands of partners in Peat Marwick's or Touche Ross's other offices who knew nothing of the Florida or Mississippi partners' actions. Punitive damage awards in these circumstances completely contradict the purposes that supposedly justify their existence.[14] The conduct of a member of the professional staff who may himself be liable for punitive damages will be in many instances conduct that the *firm* could not have prevented. There obviously are inherent limits to the ability of any firm to prevent errors that juries might later find egregious enough to justify punitive liability. See Note, *supra*, 70 Yale L.J. at 1304. These limitations necessarily dictate, as a matter of due process, that punitive damages not be visited on those who could not prevent the misconduct.

Moreover, the problem of vicarious liability for punitive damages is compounded for amici by the fact that they are organized as professional partnerships. Vicarious punitive awards put every one of amici's thousands of partners personally at risk for punitive liability based on alleged torts committed by other partners or employees in one of the firms' hundreds of offices in which they conduct their far-flung operations—torts of which the

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[13] The punitive award against Touche Ross was later set aside when the entire judgment was reversed on other grounds. *Touche Ross & Co.* v. *Commercial Union Ins. Co.*, 514 So. 2d 315 (Miss. 1987).

[14] See Morris, *supra*, 44 Harv. L. Rev. at 1201 ("One would expect to find that partners are not liable in punitive damages for torts committed by their copartners. Certainly one partner does not have much power to punish the other. But such does not seem to be the universally accepted law.").

partners may know nothing and about which the partners may be able to do nothing. See *Meleski* v. *Finero Int'l Restaurant, Inc.*, 47 Md. App. 526, 424 A.2d 784, 790-793 (1981) (affirming joint and several punitive awards against partners without regard to whether the partners had authorized, ratified, or participated in the tort); see also *Hatrock*, 750 F.2d at 771, 773 n.3 (affirming jury's punitive award against brokerage firm based on tort of limited partner in one of its more than 500 one-person offices even though jury found that brokerage firm had properly supervised its staff).

Consider the personal joint and several liability for a punitive damage award of each of the 140 partners in a hypothetical multi-city law firm attributable to the professional malpractice of one of the firm's 200 associates in one of its six offices who neglected to file a client's complaint until after the statute of limitations had run. It is simply irrational to suggest that each of the partners should be subjected to vicarious punitive liability for the tort of an associate for his work on a matter of which most of them would and could know nothing. Multiply the numbers in this hypothetical more than ten times over, and the risk faced on average by each of the partners in amici's firms becomes clear. In short, amici practice their profession in an environment in which the imposition of vicarious punitive liability for the individual torts of members or employees of the firm is the most egregious sort of punishment-without-fault, and constitutionally impermissible.

4. *The Imposition Of Vicarious Punitive Liability On Professional Service Firms Is Not Necessary To Further The Deterrent Purpose Of Punitive Damages*

Amici already face powerful incentives to do all within their power to attempt to ensure that they will not fall short of the highest professional standards. These incentives include the preservation and enhancement of their professional reputations, which are a critical part of what

amici offer clients (see Fischel, *supra*, 52 Brooklyn L. Rev. at 1052; Note, *supra*, 5 Yale L. & Pol'y Rev. at 525 & nn.51-53), and the exposure to liability for compensatory damages. See *id.* at 525 & n.55; *Smith* v. *Wade*, 461 U.S. at 50 (noting deterrent effect of compensatory liability); Note, *supra*, 70 Yale L.J. at 1306 (same).[15]

Accounting firms in general and amici in particular therefore do a great deal to guard against inadequate professional performance. The accounting profession has long imposed on itself an extensive system of self-regulation and monitoring to ensure the maintenance of the highest professional standards. The American Institute of Certified Public Accountants (AICPA), of which the individual CPAs affiliated with amici are members, promulgates numerous binding rules of conduct for auditing and other aspects of the profession, including a detailed set of requirements for quality control programs by accounting firms.[16] In addition, membership in the SEC Practice Section of the AICPA requires accounting firms to undergo peer reviews and continuing education.[17]

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[15] In addition to the deterrent effect of compensatory awards, the transaction costs associated with defending against charges of liability provide yet another deterrent to culpable conduct. In 1989, amici collectively incurred more than $100 million in out-of-pocket defense costs. In addition, thousands of hours of professional time necessarily were diverted from the rendition of services to the defense of litigation.

[16] See *System of Quality Control for a CPA Firm*, 2 AICPA Professional Standards (CCH) QC § 10.01 to QC § 10.10 (1979). Among other things, these standards require amici to implement procedures to enhance independence, supervision of professional staff, and professional development of staff (see *id.* § 10.07, at 17,061-17,063), as well as an annual inspection of the quality control procedures themselves (*id.* at 17,061; see also *id.* Interpretations of Quality Control Standards § 10-2.05, at 17,125-17,126).

[17] The SEC Practice Section is composed of accountants engaged to examine the financial statements of public companies whose shares are registered with the SEC. The mandatory peer review takes place triennially, is done by a team of professionals from another member firm of the SEC Practice Section, is paid for by the

With this extensive system of mandatory self-regulation already in place to avoid professional misjudgments, vicarious liability for punitive damages is hardly required to serve the deterrent purpose of causing amici to initiate preventive measures. Because such awards are not rationally related to the deterrence of individual instances of professional misconduct, but rather constitute punishment of the innocent for the fault of others, they are a violation of due process.

II. THE CONSTITUTIONALLY PERMISSIBLE MEASUREMENT OF A PUNITIVE DAMAGE AWARD SHOULD NOT TURN SOLELY ON A MULTIPLE OF COMPENSATORY DAMAGES OR THE SIZE OF THE DEFENDANT

As petitioner and other amici explain in their briefs, the Due Process Clause requires both standards for the imposition of punitive damages and a rational relationship between the size of the award and the purposes of punitive damages—punishment and deterrence. No single factor will by itself protect against arbitrariness or establish that rational relationship, and there are thus a number of factors that may be considered together to produce a reasonable range of permissible punitive damage awards. The States are surely free to establish different formulas and standards, but the Fourteenth Amendment does operate as a *limitation* on the standards that the States may permissibly employ. Thus, we focus the discussion that follows primarily on some of the standards commonly employed by the States that, if applied in isolation, are most likely to produce unconstitutionally

firm undergoing review, and is extensive. See *SECPS Manual* §§ 1, 2 (AICPA Div. for CPA Firms, SEC Practice Section 1986). Membership in the SEC Practice Section also requires each professional staff member of a member firm to put in at least 120 hours every three years on continuing professional education in accounting and auditing. See *SECPS Manual* § 1, at 107. During 1989 alone, amici collectively spent far more than $100 million on continuing education for their professional staff.

excessive punitive damage awards in violation of the Fourteenth Amendment.

A. A Numerical Ratio Between Compensatory Damages And Punitive Damages Cannot By Itself Ensure A Constitutionally Permissible Limit On The Size Of Punitive Damage Awards

It has sometimes been suggested that punitive awards should be set at some multiple of compensatory awards. That approach may work reasonably well in certain cases, but a mechanical rule that tests the excessiveness of punitive damages solely by reference to their numerical relationship to the compensatory award will inevitably produce unconstitutional results in certain categories of cases. This is so because the amount of actual damages incurred by a plaintiff has no necessary connection to either the gravity of the wrongful conduct of the defendant or the extent of the benefit obtained by the defendant as a result of the wrong. See *In re Paris Air Crash*, 622 F.2d at 1322. Indeed, it would be sheer fortuity if punitive damage awards that were determined only by reference to some multiple of compensatory damage awards resulted in constitutionally permissible awards.

The situations in which amici are exposed to tort liability provide a clear illustration of the constitutional infirmity in any rule that looks solely to a numerical ratio between compensatory damages and punitive damages. Very large investments and business transactions such as mergers and acquisitions often hinge on the financial condition of the companies whose financial statements amici are called on by clients to examine. When these transactions go "sour," amici frequently are the only defendants with sufficient assets to satisfy claims made by disappointed investors or creditors. Thus, amici find themselves subject to potentially very large compensatory awards even though any culpability on their part is almost always many orders of magnitude less than that of others involved in a particular transaction. The sheer size of the underlying investment or transaction under-

taken by the client typically means that the amount of compensatory damages assessed against amici for economic loss may be in the millions of dollars.[18]

Such large compensatory damages are altogether disproportionate to the gravity of the alleged wrong of the accountant—a wrong that, as previously described, may be no more than a professional misjudgment later found by a jury to have been "intentional," "reckless," or "grossly" negligent. A multi-million-dollar compensatory award for such a misjudgment therefore already levies very substantial punishment and deterrence on the accounting firm. See *Smith* v. *Wade*, 461 U.S. at 50 (exposure to compensatory liability deters potential tortfeasors). In these circumstances the rote application of a prescribed multiple of compensatory damages cannot produce a constitutionally permissible measurement of punitive damage awards.

Likewise, the very large compensatory damages to which amici are exposed are out of all proportion to the benefit an accounting firm might gain as a result of the wrong committed. Amici do not partake of the enormous economic gains shared by their clients and their clients' investment advisors; at most, the "benefit" that amici

[18] See, *e.g.*, *Westmont Tractor Co.* v. *Touche Ross & Co.*, No. 87-4242 (9th Cir. 1988) ($5 million in compensatory damages); *Manufacturers Hanover Trust Co.* v. *Arthur Andersen & Co.*, No. 82-CIV-6622 (S.D.N.Y. 1988) ($17 million in compensatory damages); *Scioto Memorial Hospital Ass'n* v. *Price Waterhouse*, No. 85CV-08-4513 (Ct. Common Pleas, Franklin Cty., Ohio 1988) (post-trial motion pending) ($15.8 million in compensatory damages); *The Billings Clinic* v. *Peat Marwick Main & Co.*, No. DV-85-2687 (13th Judicial Dist., Yellowstone Cty., Mont. 1988) ($3.3 million in compensatory damages), appeal pending, No. 88-623 (Mont.); *In re Osborne Securities Cases*, Coordination Proceeding No. 1805 (Santa Clara Cty., Cal. 1987) ($4.2 million in compensatory damages assessed against Arthur Young & Company, predecessor to amicus Ernst & Young), appeal pending, No. H003695 (Cal. App.) (argued April 24, 1990); *First Small Business Inv. Co.* v. *Butler, Binion, Rice & Knapp*, No. H-84-3276 (S.D. Tex. 1987), and *Republic Venture Group, Inc.* v. *Butler, Binion, Rice & Knapp*, No. H-85-3528 (S.D. Tex. 1987) (approximately $5 million in compensatory damages assessed against amicus Coopers & Lybrand), rev'd as time barred, No. 85-6167 (5th Cir. May 9, 1990).

could expect to gain from any misconduct would be limited to the relatively modest income they receive from the particular professional services at issue. Thus, in the vast majority of cases confronted by amici, measuring punitive damage awards by reference to a multiple of compensatory damages can only produce an unconstitutionally excessive award.[19]

B. The Size Of A Punitive Damage Award Cannot Be Justified Solely By Reference To The Size Of An Institutional Defendant

The size of a firm also cannot serve as the sole factor justifying the amount of an award of punitive damages. If the size of an institutional defendant, standing alone, were a sufficient benchmark to insulate a punitive damage award from constitutional attack, then the totality of the constitutional standard would perversely turn on who or what the defendant is rather than what the defendant did. Such a rule would transform the award of punitive damages into a game of "pin the tail on the biggest donkey" that can have no place in any rational system of punishment and deterrence. The size of the defendant, viewed without reference to the conduct of the defendant, is a wholly irrational basis upon which to analyze the degree of proportionality between the punishment and what is to be punished. Moreover, the manifest dangers of prejudice and arbitrariness once the jury is presented

[19] Our analysis in no way suggests that the *statutory* multiplication of compensatory damages is illegitimate. See, *e.g.*, 15 U.S.C. § 15 (treble damages for antitrust violations). This distinction derives from fundamental differences between juries and legislatures. A jury does not have the ability of a legislature to make detailed factual investigations to determine a rational way to fix damages on the average for a particular class of cases. Moreover, unlike a legislature, a civil jury is an *ad hoc* body that exists only for the purpose of deciding a particular private dispute; it has neither the breadth of perspective nor the public accountability of a legislature. See also note 7, *supra*.

with evidence of the defendant's size, fully set out in the briefs of petitioner and other amici, counsel in favor of tight restrictions on the jury's ability to consider that factor at all.

In the case of economic torts committed by defendants organized to produce an economic profit, such as petitioner and amici, the States may most easily serve the purpose of punitive damages and arrive at constitutionally proportionate punitive awards by setting the ceiling on the size of punitive awards with reference to the amount of the economic benefit the defendant gained or expected to gain from the commission of the tort. See, *e.g.*, *Hawkins* v. *Allstate Ins. Co.*, 733 P.2d 1073, 1080-1081 (Ariz.) (noting the relevance to the excessiveness inquiry of "the profitability of the defendant's [wrongful] conduct"), cert. denied, 484 U.S. 874 (1987). A measure based primarily on the profit to be gained from the wrong ties the size of the punitive award to the motivation the intentional or reckless indulgence of which caused the economic actor to commit the tort; this is the motivation whose exercise a punitive award is intended to punish and deter.

For amici, as previously explained, the benefit to be realized by tortious misconduct must be measured with reference to the actual or expected economic gain that a firm hoped to realize for its professional services. See pp. 27-28, *supra*. Similarly, the Alabama Supreme Court in this case should have considered the fact that petitioner stood to gain *absolutely nothing* by Ruffin's misconduct. Had the court done so, it would have been readily apparent that a punitive award of more than $1 million bore no rational relationship to petitioner's economic expectations and was far in excess of any amount necessary to satisfy the goals of punishment and deterrence.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted.

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